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COURT OF APPEALS

DEBTOR-CREDITOR, SECURITIES, CIVIL PROCEDURE.

ONCE AN ACTION TO RECOVER THE PRINCIPAL OF A BOND IS TIME-BARRED, THERE IS NO LEGALLY COGNIZABLE CLAIM FOR POST-MATURITY INTEREST.

The Court of Appeals, in a full-fledged opinion by Judge Feinman, determined that a bond issuer is not obligated to pay interest once a claim for the principal is time-barred: "The United States Court of Appeals for the Second Circuit has asked us to decide ... '[i]f a bond issuer remains obligated to make biannual interest payments until the principal is paid, including after the date of maturity ... , do enforceable claims for such biannual interest continue to accrue after a claim for principal of the bonds is time-barred?' We answer this question in the negative ... . Pursuant to New York common law and the terms of the indenture, in the absence of a timely action to recover principal, a bondholder cannot enforce the conditional obligation to make post-maturity interest payments. * * * The rule we reiterate today effectuates the agreement negotiated by the parties and reinforces our longstanding view of interest as generally dependent on principal. Moreover, it promotes the purposes underlying the statute of limitations ... . For those reasons, we conclude that once a claim on the principal is time-barred, a claim to recover unpaid post-maturity interest payments is not legally cognizable." ***Ajdler v. Province of Mendoza*, 2019 N.Y. Slip Op. 02151, CtApp 3-21-19**

MUNICIPAL LAW, ADMINISTRATIVE LAW.

RELATED PUBLIC AUTHORITIES PROPERLY REQUIRED TO FILE SEPARATE REPORTS WITH THE NYS AUTHORITIES BUDGET OFFICE.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, determined that the NYS Authorities Budget Office (ABO) properly required the Madison County Industrial Development Agency (MCIDA) and the related Madison Grant Facilitation Corporation (MGFC) to file separate reports pursuant to the Public Authorities Accountability Act (PAAA) and the Pbblic Authorities Law. MCIDA had filed a single consolidated report and brought an Article 78 proceeding arguing the ABO's determination that separate reports must be filed was arbitrary and capricious: "The ABO's narrow record-keeping determination was not contrary to law. The Public Authorities Law plainly provides that a local development corporation such as MGFC, which is 'affiliated' with a local IDA, is also a local authority subject to the PAAA and, as such, has reporting obligations (Public Authorities Law § 2 [2] [d]). Regardless of whether MGFC is also a subsidiary, it is clearly an 'affiliate' of MCIDA within the meaning of the statute ... . The PAAA does not contain a reporting exception for subsidiaries of local authorities, and petitioners have not identified any other statute or regulation that excused MGFC from its obligation to separately report." ***Matter of Madison County Indus. Dev. Agency v. State of New York Auths. Budget Off.*, 2019 N.Y. Slip Op. 02150, CtApp 3-21-19**

FIRST DEPARTMENT

CRIMINAL LAW.

INABILITY TO IMPOSE THE PROMISED SENTENCE REQUIRED THAT DEFENDANT'S GUILTY PLEA BE VACATED.

The First Department, reversing Supreme Court, determined defendant's motion to vacate his plea because the promised sentence could not be imposed should have been granted: "[D]efendant is entitled to vacatur of the plea because his negotiated plea included a promise of shock incarceration, and that promise cannot be honored because shock incarceration is only available for persons convicted of controlled substance or marijuana offenses ... . Since the guilty plea was induced by an unfulfilled promise, we vacate the plea in its entirety. The SCI was part and parcel of the negotiated plea. Therefore, we restore defendant to his preplea status and reinstate the indictment ...". ***People v. Golden*, 2019 N.Y. Slip Op. 02027, First Dept 3-19-19**

CRIMINAL LAW, EVIDENCE.

CROSS-RACIAL IDENTIFICATION JURY INSTRUCTION SHOULD HAVE BEEN GIVEN, ERROR HARMLESS HOWEVER.

Although the error was deemed harmless, the First Department determined the cross-racial identification jury instruction should have been given: "The trial court denied defendant's request for a charge on cross-racial identification. Since then, the Court of Appeals decided People v. Boone, which held that 'when identification is an issue in a criminal case and the identifying witness and defendant appear to be of different races, upon request, a party is entitled to a charge on cross-racial identification' and the trial court must give the charge if a party requests it (30 NY3d 521, 526 [2017]). Since identification was an issue in this case and the victim and defendant were of different races, the motion court should have granted the request for the charge on cross-racial identification. However, we find the error harmless given that the video supports the victim's testimony about the incident and his familiarity with defendant. Further, the victim told police that the robber had an MTA connection, and defendant was arrested wearing an MTA jacket. The identification testimony was unusually strong and the evidence of defendant's guilt was overwhelming ... . Also, there is no significant probability that defendant would have been acquitted but for this charge error ...". ***People v. Patterson*, 2019 N.Y. Slip Op. 02154, First Dept 3-21-19**

CRIMINAL LAW, EVIDENCE, APPEALS.

MOTION TO SUPPRESS SHOULD NOT HAVE BEEN DENIED ON THE GROUND THAT DEFENDANT LACKED STANDING, OTHER GROUNDS FOR SUPPRESSION NOT RAISED BELOW COULD NOT BE CONSIDERED ON APPEAL, DEFENSE COUNSEL SHOULD NOT HAVE BEEN PRECLUDED FROM CROSS-EXAMINING A POLICE OFFICER ABOUT A CIVIL SUIT AGAINST HIM.

The First Department, reversing defendant's conviction, determined that defendant's motion to suppress the weapon he dropped should not have been denied on the ground defendant lacked standing and defense counsel should not have been precluded from cross-examining a police officer about allegations made in a federal civil suit against him. The First Department noted it could not consider alternative grounds for suppression not raised below: "Two officers testified at the hearing to the effect that the pistol was recovered immediately after it fell from defendant's person. Since this Court lacks jurisdiction to affirm the denial of defendant's motion to suppress the pistol on the alternative ground that the police had reasonable suspicion to stop and frisk him, a ground upon which the hearing court did not rule, we 'reverse the denial of suppression and remit the case to Supreme Court for further proceedings'... . Defendant is also entitled to a new trial, because the trial court improperly precluded his counsel from cross-examining the only police officer who allegedly saw the pistol falling from his person about allegations raised in a federal civil action against the officer, which had settled. Counsel had a good faith basis for seeking to impeach the officer's credibility by asking him about allegations that he and other officers approached and assaulted the plaintiff in that case without any basis for suspecting him of posing a danger and filed baseless criminal charges against him ... . Although trial courts 'retain broad discretion' over the admission of prior bad acts allegedly committed by a police witness or other witness ... , the court improvidently exercised its discretion by entirely precluding any cross-examination about the allegations at issue here without any valid ...". ***People v. Holmes*, 2019 N.Y. Slip Op. 02033, First Dept 3-19-19**

FALSE ARREST, MALICIOUS PROSECUTION.

PLAINTIFF WAS ARRESTED AND CHARGED WITH MURDER IN 2002 AND ACQUITTED IN 2006, CHALLENGES TO THE PROBABLE CAUSE TO ARREST AND THE PROPRIETY OF THE PROSECUTION DEEMED SPECULATIVE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED.

The First Department, in a full-fledged opinion by Justice Tom, over a two-justice dissenting opinion, determined defendants' motion for summary judgment was properly granted. The opinion is fact-specific and cannot be fairly summarized here. Plaintiff was arrested and charged with murder in 2002 and was acquitted in 2006: "Certain facts pertinent to the shooting are undisputed. For the subsequent civil action, plaintiff's strategy has focused on disputing the identification of him as the shooter. The record, including numerous police reports and statements by witnesses, reflects that the shooting outside of a well attended social event caused significant confusion as witnesses were alerted from various vantage points while many attendees remained inside. Some participants in a physical confrontation preceding the shooting apparently had not been invited and likely were unknown by attendees. Nevertheless, plaintiff's various attempts to dispute his identification as well as disparage the credibility of police and identification witnesses do not withstand a close analysis with respect to establishing the requisite elements of the civil claims. When the speculative challenges to probable cause and the propriety of the prosecution are cleared away, we are left with a record of the criminal investigation and prosecution that is factually compelling, warranting dismissal of the civil claims relevant to this appeal." ***Roberts v. City of New York*, 2019 N.Y. Slip Op. 02177, First Dept 3-21-19**

PERSONAL INJURY, EVIDENCE.

DAMAGES AWARDED 69-YEAR-OLD PLAINTIFF FOR PAST AND FUTURE PAIN AND SUFFERING DEEMED EXCESSIVE.

The First Department determined the damages awarded the 69-year-old plaintiff for past and future pain and suffering were too high: "Judgment ... upon a jury verdict, which ... awarded plaintiff $1.2 million for past pain and suffering, $1 million for future pain and suffering over 10 years, $255,582 for future medical expenses, and $250,000 for future loss of earnings ... unanimously modified ... to remand the matter for a new trial on damages for past pain and suffering and future pain and suffering, unless plaintiff stipulates ... to reduce the awards for past pain and suffering to $1,000,000 and for future pain and suffering to $675,000 ...". ***Dacaj v. New York City Tr. Auth.*, 2019 N.Y. Slip Op. 02171, First Dept 3-21-19**

PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE, PRIVILEGE, ATTORNEYS, AGENCY.

NOTES TAKEN BY AN OBSERVER HIRED BY PLAINTIFF'S ATTORNEY TO WITNESS AN INDEPENDENT MEDICAL EXAMINATION OF PLAINTIFF BY DEFENDANTS' DOCTOR ARE PRIVILEGED AS MATERIAL PREPARED FOR TRIAL, THE OBSERVER WAS ACTING AS AN AGENT OF PLAINTIFF'S ATTORNEY.

The First Department, in a full-fledged opinion by Justice Gische, in a matter of first impression, determined that the notes taken by an observer at an independent medical exam (IME) of plaintiff by defendants' doctor are protected by the privilege afforded materials prepared for litigation. The observer was hired by plaintiff's attorney and was deemed to be acting as an agent of the attorney: "The IME observer, however, is an agent of the plaintiff's attorney. Consequently, the requested notes and materials constitute materials prepared for trial, bringing them within the conditional or qualified privilege protections of CPLR 3101(d)(2). Materials prepared in anticipation of litigation and preparation for trial may be obtained only upon a showing that the requesting party has a 'substantial need' for them in the preparation of the case and that without 'undue hardship' the requesting party is unable to obtain the substantial equivalent by other means (CPLR 3101[d][2] ...). The IME observer was hired to assist plaintiff's attorney in advancing the litigation and preparing for trial ... . Although present, she was not involved in the doctor's examination of the plaintiff. Her function was to serve as the attorney's 'eyes and ears,' observing what occurred during the IME, and then reporting that information back to plaintiff's attorney. Defendants have not shown, in response, any 'substantial need' for the IME observer's notes, etc., or why they are unable, without undue hardship, to obtain the 'substantial equivalent' of the materials by other means ... . Key to this analysis is that the defendants' doctor conducted plaintiff's examination and can provide defendants with any information concerning what generally occurred and what he did at the IME." ***Markel v. Pure Power Boot Camp, Inc.*, 2019 N.Y. Slip Op. 02049, First Dept 3-19-19**

PERSONAL INJURY, LANDLORD-TENANT.

PLAINTIFF, WHO WAS ASSAULTED IN DEFENDANT'S BUILDING, DID NOT RAISE A QUESTION OF FACT ON WHETHER THE ASSAILANT WAS AN INTRUDER OR A TENANT, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED.

The First Department, over a two-justice dissent, reversing Supreme Court, determined that the NYC Housing Authority's (NYCHA's) motion for summary judgment in this third party assault case should have been granted. Plaintiff, who was assaulted in defendant's building, did not raise a question of fact on whether the assailant was an intruder or a tenant. The defendant would only be liable if, due to negligence, an intruder entered the building and committed the assault: "NYCHA met its prima facie burden by demonstrating that plaintiff failed to raise an issue of fact as to whether the assailant was an intruder, as opposed to a tenant or invitee lawfully on the premises ... . In support of its motion, NYCHA submitted plaintiff's deposition testimony that she was not a resident and did not know any other tenants in the building aside from her two patients. Plaintiff also testified that she did not see her assailant's face because he kept his face covered with the hood of his sweatshirt and that she did not know if her assailant was a tenant or guest. We previously have held that the victim's familiarity with building residents, a history of ongoing criminal activity, and the assailant's failure to conceal his or her identity tend to demonstrate that the assailant was more likely than not an intruder ... . Here, plaintiff's testimony demonstrates that these important factors were not present. Thus, plaintiff 'provided no evidence from which a jury could conclude, without pure speculation, that it was more likely than not that the assailant was an intruder' ...". ***Laniox v. City of New York*, 2019 N.Y. Slip Op. 02026, First Dept 3-19-19**

SECOND DEPARTMENT

ATTORNEYS.

NONPARTY LAW FIRM SHOULD HAVE BEEN ALLOWED TO WITHDRAW AS COUNSEL FOR DEFENDANTS BASED UPON DEFENDANTS' FAILURE TO PAY REASONABLE ATTORNEY'S FEES AND FAILURE TO COOPERATE.

The Second Department, reversing Supreme Court, determined the nonparty law firm, Kaufman, should have been allowed to withdraw as counsel for defendants T & V and Komninos based upon defendant's failure to pay attorney's fees and failure to cooperate: "The Supreme Court improvidently exercised its discretion in denying the law firm's unopposed

motion for leave to withdraw as counsel for T & V and Komninos. An attorney may be permitted to withdraw from employment where a client refuses to pay reasonable legal fees (see Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.16[c][5] ...). Likewise, an attorney may withdraw from representing a client if the client 'fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively' (Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.16[c][7] …). Here, the law firm established that T & V and Komninos failed in their obligation to pay the legal fees earned by the law firm and further failed to cooperate in their representation. Moreover, T & V and Komninos did not oppose that branch of the law firm's motion which was for leave to withdraw as their counsel. Accordingly, that branch of the motion which was for leave to withdraw as counsel for T & V and Komninos should have been granted ...". ***Villata v. Kokkinos*, 2019 N.Y. Slip Op. 02143, Second Dept 3-20-19**

CIVIL PROCEDURE, CORPORATION LAW.

DEFENDANT'S MOTION TO VACATE A DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED DESPITE FAILURE TO UPDATE THE ADDRESS ON FILE WITH THE SECRETARY OF STATE.

The Second Department, reversing Supreme Court, determined defendant's motion to vacate a default judgment should have been granted, despite defendant's failure to update its address with the Secretary of State: "There was no evidence that the defendant received actual notice of the summons delivered to the Secretary of State, which does not constitute personal delivery, in time to defend this action). Although the defendant did not explain why it failed to update its address with the Secretary of State, 'there is no necessity for a defendant moving pursuant to CPLR 317 to show a reasonable excuse for its delay' ... . Furthermore, there is no basis in the record to conclude that the defendant deliberately attempted to avoid service, especially since the plaintiff had actual knowledge of the defendant's Westchester County... business address at least two months before the summons and complaint were filed in this action and, thus, could have attempted to serve the defendant personally pursuant to CPLR 311 ... . Nor is there any evidence that the defendant was placed on notice that the address on file with the Secretary of State was incorrect ... . Moreover, the defendant met its burden of demonstrating the existence of a potentially meritorious defense ...". ***Berardi Stone Setting, Inc. v. Stonewall Contr. Corp.*, 2019 N.Y. Slip Op. 02053, Second Dept 3-20-19**

CIVIL PROCEDURE, FORECLOSURE.

FORECLOSURE ACTION SHOULD NOT HAVE BEEN DISMISSED AS ABANDONED OR FOR FAILURE TO PROSECUTE.

The Second Department, reversing Supreme Court, determined the foreclosure action should not have been dismissed as abandoned pursuant to CPLR 3215(c) or for neglect to prosecute pursuant to CPLR 3216: "It is not necessary for a plaintiff to actually obtain a default judgment within one year of the default in order to avoid dismissal pursuant to CPLR 3215(c) ... . Rather, it is enough that the plaintiff timely takes the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference to establish that it initiated proceedings for entry of a judgment within one year of the default for the purposes of satisfying CPLR 3215(c) ... . Within one year after the defendant's default, the plaintiff took the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference (see RPAPL 1321[1]) and, thus, did not abandon this action ... . Furthermore, the Supreme Court was without power to direct dismissal of the complaint pursuant to CPLR 3216 on the ground of lack of prosecution. While CPLR 3216 authorizes the dismissal of a complaint for neglect to prosecute, joinder of issue and service of a 90-day notice are conditions precedent to a dismissal under that statute ... . Here, dismissal was improper, as issue was never joined in the action ...". ***US Bank, N.A. v. Picone*, 2019 N.Y. Slip Op. 02141, Second Dept 3-20-19**

CIVIL PROCEDURE, JUDGES.

SANCTION FOR PLAINTIFF'S FAILURE TO COMPLY WITH A CONDITIONAL ORDER OF PRECLUSION SHOULD NOT HAVE GONE BEYOND THE PENALTY DESCRIBED IN THE ORDER.

The Second Department, modifying Supreme Court, determined that the sanction imposed for plaintiff's failure to turn over audio files and transcripts she was apparently relying upon to prove employment discrimination should not have gone beyond the terms of the conditional order of preclusion: " 'A conditional order of preclusion requires a party to provide certain discovery by a date certain, or face the sanctions specified in the order' ... . 'With this conditioning, the court relieves itself of the unrewarding inquiry into whether a party's resistance was willful' ... . 'When a plaintiff fails to timely comply with a conditional order of preclusion, the conditional order becomes absolute' ... . [W]here, as here, a conditional order of preclusion specifies a penalty for the failure to comply, absent a change in circumstances, it is inappropriate for the court to impose a harsher penalty ... . The Supreme Court improvidently exercised its discretion in barring the plaintiff from offering any evidence for any claim premised on the introduction of or which relies on the audio files the plaintiff failed to produce. Instead, the appropriate sanction was the one set forth in the conditional order of preclusion, which precluded the plaintiff from using the audio files and corresponding transcripts at trial unless she produced these items by a date certain, which she failed to do." ***Felice v. Metropolitan Diagnostic Imaging Group, LLC*, 2019 N.Y. Slip Op. 02067, Second Dept 3-20-19**

CIVIL PROCEDURE, PERSONAL INJURY, JUDGES, MUNICIPAL LAW.

SUPREME COURT SHOULD NOT HAVE SEARCHED THE RECORD AND AWARDED SUMMARY JUDGMENT TO THE CITY IN THIS SIDEWALK SLIP AND FALL CASE, NO SUCH MOTION WAS BEFORE THE COURT.

The Second Department determined that Supreme Court should not have searched the record and awarded summary judgment to the city in this sidewalk slip and fall case. No such motion was before the court: "[T]he Supreme Court should not have, in effect, searched the record and awarded summary judgment to the City, which did not move for such relief. 'A court may search the record and grant summary judgment in favor of a nonmoving party only with respect to a cause of action or issue that is the subject of the motions before the court' ... . Since no party made any motion with respect to the plaintiff's direct cause of action against the City contained in the amended complaint, the court should not have granted relief with respect to that cause of action ...". ***Cerbone v. Lauriano*, 2019 N.Y. Slip Op. 02056, Second Dept 3-20-29**

CIVIL PROCEDURE, NEGLIGENCE, MEDICAL MALPRACTICE.

AUDIT TRAIL, I.E., METADATA SHOWING WHO ACCESSED PLAINTIFF'S MEDICAL RECORDS, WHERE AND WHEN THEY WERE ACCESSED, AND ANY CHANGES TO THE RECORDS, WAS DISCOVERABLE IN THIS MEDICAL MALPRACTICE ACTION ALLEGING IMPROPER TREATMENT AFTER SURGERY.

The Second Department, reversing Supreme Court, determined that the so-called "audit trail," which indicates who accessed plaintiff's medical records, where and when they were accessed and any changes made to the records (metadata), was discoverable in this medical malpractice action. The complaint alleged failure to properly treat plaintiff after surgery which led to infection and amputation: "The plaintiffs demonstrated, and Wyckoff [medical center] does not dispute, that an audit trail generally shows the sequence of events related to the use of a patient's electronic medical records; i.e., who accessed the records, when and where the records were accessed, and changes made to the records ... . Hospitals are required to maintain audit trails under federal and state law (see 45 CFR 164.312[b]; 10 NYCRR 405.10[c][4][v]). As argued by the plaintiffs, the requested audit trail was relevant to the allegations of negligence that underlie this medical malpractice action in that the audit trail would provide, or was reasonably likely to lead to, information bearing directly on the post-operative care that was provided to the injured plaintiff. Moreover, the plaintiffs' request was limited to the period immediately following the injured plaintiff's surgery. The plaintiffs further demonstrated that such disclosure was also needed to assist preparation for trial by enabling their counsel to ascertain whether the patient records that were eventually provided to them were complete and unaltered ... . In response to the plaintiffs' threshold showing, Wyckoff failed to demonstrate that the requested disclosure was improper or otherwise unwarranted. Although Wyckoff argued that the audit trail may contain information that would not be useful to the plaintiffs, it did not dispute that the audit trail would nevertheless contain information pertaining to the medical care that it provided to the injured plaintiff in the wake of his foot surgery." ***Vargas v. Lee*, 2019 N.Y. Slip Op. 02142, Second Dept 3-20-19**

EDUCATION-SCHOOL LAW, PERSONAL INJURY.

QUESTION OF FACT WHETHER SCHOOL BUS DRIVER AND MONITOR TOOK APPROPRIATE STEPS AFTER THE FIGHT IN WHICH PLAINTIFF STUDENT WAS INJURED BROKE OUT ON THE BUS.

The Second Department, reversing (modifying) Supreme Court, determined the negligent supervision action against the school bus company and the school district should not have been dismissed. Plaintiff (J.W.) was injured by another student on the bus: "[T]he bus company defendants and the school district established, prima facie, that they did not have sufficiently specific knowledge or notice of the dangerous conduct which caused injury ... . However, in opposition, the plaintiff raised triable issues of fact as to whether J. W.'s injuries were a foreseeable consequence of the bus driver and bus monitor's alleged failure to respond appropriately as the events unfolded ... , and whether the bus driver and bus monitor took 'energetic steps to intervene' in the fight ... . Accordingly, the Supreme Court should have denied the motion of the bus company defendants and the school district for summary judgment dismissing the complaint insofar as asserted against them." ***Williams v. Student Bus Co., Inc.*, 2019 N.Y. Slip Op. 02146, Second Dept 3-20-19**

EMINENT DOMAIN, MUNICIPAL LAW.

PRIOR PUBLIC USE DOCTRINE PRECLUDED CONDEMNATION OF LAND ALREADY SUBJECT TO A PUBLIC USE BECAUSE THE PROPOSED USE WOULD INTERFERE WITH THE EXISTING PUBLIC USE.

The Second Department, reversing the condemnation of a parcel of land owned by the city, determined that the proposed new use of the land would interfere with its current public use as a bus depot, a violation of the prior public use doctrine: "[T]he proposed condemnation is prohibited under the doctrine of prior public use. Under the doctrine of prior public use, land already devoted to a public use may not be condemned absent legislative authority for the particular acquisition at issue ... . However, land already devoted to a public use may be condemned without legislative authority 'where the new use would not materially interfere with the initial use'' ... . The Agency does not contest that the subject parcel is devoted to a public use, or that there exists no legislative authority for the proposed condemnation ... . Thus, the subject parcel may

not be condemned unless the new use would not materially interfere with the existing public use ... . The Agency's proposed condemnation of the subject parcel for the purpose of returning the parcel to productive use in furtherance of urban renewal would materially interfere with its existing public use as a bus depot. ... Accordingly, the Agency's determination to condemn the subject parcel must be rejected." ***Matter of City of New York v. Yonkers Indus. Dev. Agency*, 2019 N.Y. Slip Op. 02087, Second Dept 3-20-19**

FAMILY LAW.

PUBLIC POLICY PRECLUDED RECOVERY OF CHILD SUPPORT OVERPAYMENTS.

The Second Department, reversing Supreme Court, determined that public policy precluded plaintiff from recovering child support overpayments: " 'There is strong public policy in this state, which the [Child Support Standards Act] did not alter, against restitution or recoupment of the overpayment of child support' ... . The rationale behind this policy is that child support payments are deemed to have been used to support the children, so 'no funds exist from which one may recoup moneys so expended'... . '[R]ecoupment of child support payments is only appropriate under limited circumstances" ... . The plaintiff failed to demonstrate the existence of any circumstances which counter this state's strong public policy against reimbursement of child support overpayments ... . The plaintiff could have requested a modification of his child support obligation in accordance with the stipulation, but failed to do so ...". ***Fortgang v. Fortgang*, 2019 N.Y. Slip Op. 02068, Second Dept 3-20-19**

FAMILY LAW, ATTORNEYS, CONTEMPT.

COURT SHOULD HAVE INQUIRED INTO FATHER'S ELIGIBILITY FOR ASSIGNED COUNSEL IN THE CONTEMPT PROCEEDINGS STEMMING FROM FATHER'S FAILURE TO PAY CHILD SUPPORT, FATHER WAS DEPRIVED OF HIS RIGHT TO COUNSEL, NEW HEARING ORDERED.

The Second Department, ordering a new hearing, determined father was deprived of is right to counsel in a contempt proceeding stemming from his failure to pay child support: "A respondent in a contempt proceeding before the Family Court 'has the right to the assistance of counsel,' including 'the right to have counsel assigned by the court' if 'he or she is financially unable to obtain the same' (Family Ct Act § 262[a]). 'Where a party indicates an inability to retain private counsel, the court must make inquiry to determine whether the party is eligible for court-appointed counsel' ... . 'The deprivation of [a parent's] fundamental right to counsel requires reversal, without regard to the merits of [his or] her position' ... . We agree with the father's contention that he was deprived of his right to counsel. After the Support Magistrate adjourned the hearing for the express purpose of allowing the father to retain counsel, the father appeared at the next hearing date without counsel and informed the Support Magistrate that he could not afford to hire an attorney because he had lost his job following the last court date. The Support Magistrate should have inquired into the father's current financial circumstances, including his expenses, to determine whether he had become eligible for assigned counsel ... . After the matter was referred to the Family Court, the court should have inquired into the father's financial circumstances, including his expenses, to determine whether he was eligible for assigned counsel in light of his contention that he could not afford to retain an attorney because he was unemployed ... . Although the court later assigned the father an attorney, the court failed to provide the 'attorney a reasonable opportunity to appear,' as the court assigned the attorney midway through the final court appearance, after the fact-finding hearing had concluded, after the Support Magistrate had made its credibility and factual findings, and after the court had decided to incarcerate the father ... . Indeed, the court denied the assigned attorney's request for an adjournment ...". ***Matter of Worsdale v. Holowchak*, 2019 N.Y. Slip Op. 02104, Second Dept 3-20-19**

FAMILY LAW, CIVIL PROCEDURE, CONTRACT LAW.

NONPARTY SUBPOENA PROPERLY QUASHED BECAUSE IT DID NOT PROVIDE THE REASONS FOR THE REQUESTED DISCLOSURE, QUESTIONS OF FACT WHETHER STIPULATION OF SETTLEMENT WAS UNCONSCIONABLE AND WHETHER PLAINTIFF EXECUTED THE STIPULATION UNDER DURESS.

The Second Department, modifying Supreme Court in this divorce action, determined: (1) the subpoena for a nonparty was defective because the reasons for the disclosure were not provided; (2) the stipulation of settlement was not demonstrated to be unconscionable as a matter of law; and (3) there were questions of fact whether the stipulation was signed under duress: "Pursuant to CPLR 3101(a)(4), a party may obtain discovery from a nonparty where the matter sought is material and necessary to the prosecution or defense of an action ... . A party seeking discovery from a nonparty must apprise the nonparty of the circumstances or reasons requiring disclosure (see CPLR 3101[a][4] ...). Here, we disagree with the Supreme Court's determination that the testimony sought from the nonparty was utterly irrelevant [the nonparty was a women with whom defendant allegedly had an affair]. However, we agree with the court's determination that the subpoenas were defective since, among other things, the defendant failed to provide the nonparty with the required explanation of the circumstances or reasons requiring disclosure either on the face of the subpoenas or in any accompanying material (see CPLR 3101[a][4] ...). Accordingly, we agree with the court's granting of the nonparty's motion to quash the subpoenas." ***Gandham v. Gandham*, 2019 N.Y. Slip Op. 02069, Second Dept 3-20-19**

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

BANK FAILED TO DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304, BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED.

The Second Department, reversing Supreme Court, determined the plaintiff bank failed to demonstrate compliance with the notice requirements of RPAPL 1304. Therefore the bank's motion for summary judgment should not have been granted: "[T]he plaintiff relied upon the affidavit of an employee who claimed that the plaintiff's business records showed that RPAPL 1304 notices were sent by certified and first-class mail. However, the documentary evidence submitted in support of those claims redacted certain tracking numbers and failed to establish, prima facie, that the notices were mailed by first-class mail ...". ***Citimortgage, Inc. v. Succes*, 2019 N.Y. Slip Op. 02058, Second Dept 3-20-19**

INSURANCE LAW.

PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON ACTION TO RECOVER PROCEEDS OF LIFE INSURANCE POLICY, INSURER DID NOT DEMONSTRATE THE INSURED WAS NOTIFIED OF THE PREMIUM DUE DATE.

The Second Department, reversing Supreme Court, determined that the life insurance policy was never canceled and plaintiff was entitled to summary judgment in the action to recover the proceeds: "As relevant here, Insurance Law § 3211 provides that '[n]o policy of life insurance . . . delivered or issued for delivery in this state . . . shall terminate or lapse by reason of default in payment of any premium . . . in less than one year after such default, unless, for scheduled premium policies, a notice shall have been duly mailed at least fifteen and not more than forty-five days prior to the day when such payment becomes due' (Insurance Law § 3211[a][1]). The notice required shall 'be duly mailed to the last known address of the policyowner' ... . 'The burden of proving valid cancellation of an insurance policy is upon the insurance company disclaiming coverage based on cancellation' ... . We agree with the Supreme Court that William Penn failed to meet that burden and, therefore, was not entitled to summary judgment dismissing the complaint insofar as asserted against it. The evidence submitted on the motion and cross motion established that William Penn was aware that the policyholder had changed his address, but it failed to send a notice of premium due to that last known address at least fifteen days prior to the day when such payment became due ... . Consequently, in accordance with the statute, the policy remained in effect for one year after the March 14, 2012, premium due date (see Insurance Law § 3211[a][1]). Since the policy was in effect on the date of the policyholder's death, the plaintiff was entitled to summary judgment on the complaint insofar as asserted against William Penn ...". ***Bradley v. William Penn Life Ins. Co. of N.Y.*, 2019 N.Y. Slip Op. 02054, Second Dept 3-20-19**

LABOR LAW-CONSTRUCTION LAW, EVIDENCE, PERSONAL INJURY.

DEFECTIVE A-FRAME LADDER ENTITLED PLAINTIFF TO SUMMARY JUDGMENT IN THIS LABOR LAW § 240(1) ACTION, STATEMENTS IN MEDICAL RECORDS WERE INADMISSIBLE HEARSAY.

The Second Department determined plaintiff was entitled to summary judgment in this Labor Law § 240(1) action. Plaintiff fell from an A-frame ladder which had a defective locking mechanism. The court noted that the evidence in the medical records did not raise a question of fact because the statements in the records were not admissible. The hearsay statements were not attributable to the plaintiff and had nothing to do with treatment: "The plaintiff's deposition testimony established, prima facie, that the defendant, as the general contractor, violated Labor Law § 240(1) by providing a ladder with a defective lock, which caused the ladder to collapse and the plaintiff to fall to the ground ... . [T]he notations in the hospital records upon which the defendant relies were not attributed to the plaintiff. As the defendant failed to offer evidence sufficiently connecting the plaintiff to the statements in the hospital records, the party admission exception to the hearsay rule does not apply ... . Moreover, none of the notations were germane to the plaintiff's diagnosis or treatment and, at trial, would not be admissible for their truth under the business records exception to the hearsay rule (see CPLR 4518 ...). While hearsay statements may be used to oppose motions for summary judgment, they cannot, as here, be the only evidence submitted to raise a triable issue of fact ...". ***Gomez v. Kitchen & Bath by Linda Burkhardt, Inc.*, 2019 N.Y. Slip Op. 02070, Second Dept 3-20-19**

PERSONAL INJURY.

QUESTION OF FACT WHETHER DEFENDANTS HAD ACTUAL OR CONSTRUCTIVE NOTICE OF ELEVATED WHEEL STOP IN THIS SLIP AND FALL CASE.

The Second Department determined defendants' motion for summary judgment in this parking lot slip and fall case was properly denied. There was a question of fact whether defendants had actual or constructive notice of an elevated plastic wheel stop: "The appellants failed to demonstrate, prima facie, that they lacked constructive notice of the elevated and broken wheel stop over which the plaintiff alleged she fell. They failed to present evidence of when the specific area where the plaintiff fell was last cleaned or inspected relative to when the subject accident occurred ...". ***Baviello v. Patterson Auto Convenience Store, Inc.*, 2019 N.Y. Slip Op. 02052, Second Dept 3-20-19**

PERSONAL INJURY.

DEFENDANT DRIVER HAD ONLY TWO SECONDS TO REACT TO FORKLIFT WHICH ENTERED THE ROADWAY BLOCKING THE RIGHT-OF-WAY, DRIVER'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED, NO COMPARATIVE NEGLIGENCE.

The Second Department, reversing Supreme Court, determined defendant driver was entitled to summary judgment in this traffic accident case. Defendant driver (Kim) had only two seconds to react when a forklift entered the roadway blocking the right-of-way: " 'A defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident' ... . A driver who has the right-of-way is entitled to anticipate that other drivers will obey the traffic laws requiring them to yield to the driver with the right-of-way ... . A driver traveling with the right-of-way may nevertheless be found partially responsible for an accident if he or she did not use reasonable care to avoid the accident. 'Although a driver with a right-of-way . . . has a duty to ... use reasonable care to avoid a collision, . . . a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision' ... . Here, Kim established his prima facie entitlement to judgment as a matter of law by demonstrating that the driver of the forklift negligently entered the roadway mid-block from in front of a parked truck without yielding the right-of-way to Kim, and that such negligence was the sole proximate cause of the accident. The evidence submitted in support of the motion ... demonstrated that Kim had, at most, two seconds to react before the forklift struck the passenger side of his vehicle. Thus, Kim demonstrated that he was not negligent for failing to avoid colliding with the forklift ...". ***Jeong Sook Lee-Son v. Doe*, 2019 N.Y. Slip Op. 02073, Second Dept 3-20-19**

PERSONAL INJURY, EVIDENCE.

PLAINTIFF WAS STRUCK BY A FACE PLATE WHICH FELL OFF AN AIR CONDITIONER, ALTHOUGH PLAINTIFF MADE OUT A PRIMA FACIE CASE UNDER THE DOCTRINE OF RES IPSA LOQUITUR, DEFENDANTS RAISED QUESTIONS OF FACT ABOUT THE CAUSE AND EXCLUSIVE CONTROL, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that, although a prima facie case was made out under the doctrine of res ipsa loquitur, the defendant raised questions of fact. Plaintiff was injured when a face plate fell off an air conditioner: "[A]lthough the plaintiff demonstrated, prima facie, that a face plate falling off an air conditioner is an event of a kind that ordinarily does not occur absent negligence... , the defendants raised a triable issue of fact as to whether the face plate could have fallen off the air conditioner because of the slamming of the door and not as a result of negligence ... . Furthermore, while the plaintiff demonstrated, prima facie, that the elevated air-conditioning unit was in the defendants' exclusive control ... , the defendants raised a triable issue of fact through their submissions, which demonstrated that outside contractors were responsible for the repairs and installations of air conditioning units in the school. Exclusive control is not established when third-party contractors have access to an instrumentality causing injuries ...". ***Dilligard v. City of New York*, 2019 N.Y. Slip Op. 02064, Second Dept 3-20-19**

PERSONAL INJURY, EVIDENCE.

DEFENDANT DID NOT ELIMINATE QUESTIONS OF FACT CONCERNING WHETHER IT HAD ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE ALLEGEDLY DANGEROUS CONDITION IN THIS ESCALATOR SLIP AND FALL CASE, ANY CONFLICT IN PLAINTIFF'S TESTIMONY DID NOT RENDER IT INCREDIBLE AS A MATTER OF LAW, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in the escalator slip and fall case should not have been granted: "The defendant's submissions, which included a transcript of the plaintiff's deposition testimony, failed to eliminate all triable issues of fact as to whether the defendant had actual or constructive notice of the allegedly dangerous condition of the escalator steps ... . Furthermore, the plaintiff testified at his deposition that he slipped and fell on a wet step while he was riding an escalator. In light of this testimony, it cannot be said that the plaintiff was unable to identify the cause of his accident ... . Contrary to the defendant's contention, the plaintiff's deposition testimony was not incredible as a matter of law, and any conflict in the testimony or evidence presented merely raised an issue of fact for the factfinder to resolve ...". ***Kerzhner v. New York City Tr. Auth.*, 2019 N.Y. Slip Op. 02077, Second Dept 3-20-19**

PERSONAL INJURY, MEDICAL MALPRACTICE, CIVIL PROCEDURE.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED IN THIS MEDICAL MALPRACTICE ACTION, PLAINTIFF'S EXPERT'S AFFIDAVIT WAS CONCLUSORY AND SPECULATIVE AND IMPROPERLY RAISED AN ISSUE NOT DISCERNABLE FROM THE PLAINTIFF'S BILL OF PARTICULARS.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this medical malpractice action should have been granted because the plaintiff's expert affidavit was conclusory and speculative. The court noted that plaintiff's expert raised an issue that was not discernable from the plaintiff's bill of particulars and therefore should not have been considered: "[T]he defendant established his prima facie entitlement to judgment as a matter of law by submitting an expert affirmation indicating that the treatment and care given to the plaintiff by the defendant on

May 13, 2013, did not deviate from accepted community standards of practice, that the plaintiff's infection, which occurred more than four months after that visit, was too remote in time to have been proximately caused by the defendant's treatment, and that the defendant had the plaintiff's informed consent for the procedure. In opposition, the plaintiff submitted, inter alia, an affirmation of her expert, who opined that the defendant did not follow the good and accepted podiatric standard of care because although the defendant tested the plaintiff's foot pulse and found it to be low, the defendant did not refer the plaintiff to a vascular surgeon. We agree with the defendant that this assertion was not readily discernable from the allegations in the plaintiff's bill of particulars, and, thus, was a new theory of liability that should not have been considered by the Supreme Court ...". ***Iodice v. Giordano*, 2019 N.Y. Slip Op. 02072, Second Dept 3-20-19**

PERSONAL INJURY, MUNICIPAL LAW.

ELDERLY PLAINTIFF'S HEALTH PROBLEMS EXCUSED HER FAILURE TO APPEAR FOR A GEN. MUN. LAW § 50-h HEARING, COMPLAINT SHOULD NOT HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined the elderly plaintiff's complaint, based upon a fall at defendant's city hospital, should not have been dismissed because plaintiff failed to appear at an oral examination pursuant to General Municipal Law § 50-h. Her failure to appear was due to medical problems and should have been excused: " 'Compliance with a demand for a General Municipal Law § 50-h examination is a condition precedent to the commencement of an action against a municipal defendant, and the failure to so comply warrants dismissal of the action' ... . The failure to submit to such an examination, however, may be excused in exceptional circumstances, such as extreme physical or psychological incapacity ... . Under the circumstances of this case, the plaintiff's failure to appear for the examination pursuant to General Municipal Law § 50-h should have been excused in light of the nature and extent of the plaintiff's medical and mental conditions, as documented by her doctors' letters ...". ***Riabaia v. New York City Health & Hosps. Corp.*, 2019 N.Y. Slip Op. 02136, Second Dept 3-20-19**

TRUSTS AND ESTATES.

THERE WAS NO SHOWING THAT THE ALLEGEDLY DISABLED PERSON WAS NOT COMPETENT IN 2015 WHEN THE SHORT FORM POWER OF ATTORNEY WAS EXECUTED, THEREFORE THE ATTORNEY-IN-FACT HAD THE AUTHORITY TO CREATE A SUPPLEMENTAL NEEDS TRUST FOR THE ALLEGEDLY DISABLED PERSON.

The Second Department, reversing Surrogate's Court, determined the short form power of attorney executed in 2015 by Delaney, an allegedly disabled person, was valid and allowed the attorney-in-fact, Pacchiana, to set up a supplemental needs trust for Delaney: "To be valid, a statutory short form power of attorney must '[b]e signed and dated by a principal with capacity, with the signature of the principal duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property' (General Obligations Law § 5-1501B[1][b] ...). 'Capacity' is defined as the 'ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in a power of attorney, or the authority of any person to act as agent under a power of attorney' (General Obligations Law § 5-1501[2][c]). 'A party's competence to enter into a transaction is presumed, even if the party suffers from a condition affecting cognitive function, and the party asserting incapacity bears the burden of proof' ... . 'The incapacity must be shown to exist at the time the pertinent document was executed' ... . Such incapacity was not shown here ... . Pacchiana, as Delaney's attorney-in-fact, had the authority to commence a proceeding in the Surrogate's Court for the creation of a supplemental trust in Delaney's behalf (see General Obligations Law § 5-1502H ...)". ***Matter of Delaney*, 2019 N.Y. Slip Op. 02090, Second Dept 3-20-19**

THIRD DEPARTMENT

CIVIL PROCEDURE, PERSONAL INJURY, TOXIC TORTS, EVIDENCE.

IN THIS ASBESTOS EXPOSURE CASE, A WITNESS'S VIDEOTAPED DEPOSITION TESTIMONY FROM PROCEEDINGS IN OTHER STATES SHOULD NOT HAVE BEEN ADMITTED IN THE PLAINTIFF'S DIRECT CASE OR IN THE DEFENSE CASE, NEW TRIAL ORDERED.

The Third Department, ordering a new trial, determined that videotaped deposition testimony from proceedings in other states was not admissible in the New York action. It was alleged that plaintiff's decedent died from exposure to asbestos in a joint compound made by Georgia-Pacific. An employee of Georgia-Pacific, Charles Lehnert, who was familiar with the formula for the joint compound, gave the videotaped deposition testimony: "CPLR 3117 (a) (3) provides, in relevant part, that 'any part or all of a deposition, so far as admissible under the rules of evidence, may be used . . . by any party for any purpose against any other party who was present or represented at the taking of the deposition or who had the notice required under these rules.' Here, defendant was permitted to introduce deposition testimony given by Lehnert in the 2007 Texas state court action for the purpose of demonstrating that it contradicted the 2001 and 2003 testimony that plaintiff had been permitted to introduce as part of its case-in-chief. However, although defendant was a party to the 2007 Texas action, plaintiff was not, and he had no opportunity to be present and cross-examine Lehnert. Thus, this testimony was not admis-

sible under CPLR 3117 (a) (3) ... . Although defendant did not cross-appeal, our holding reversing Supreme Court's ruling regarding Lehnert's 2007 testimony necessarily brings up for review Supreme Court's denial of defendant's motion to preclude Lehnert's 2001 and 2003 testimony (seeCPLR 5501 [a] [1] ...). Upon review, we find that none of Lehnert's deposition testimony should have been admitted into evidence at this trial. Although a live witness may be impeached with prior inconsistent testimony, Lehnert never testified for any party in this action, either at the trial itself or at any pretrial deposition. He was merely a witness who had testified years ago in multiple other states on the subject of the content of Georgia-Pacific joint compound. Rather than calling him (or any other witness) to testify on this topic, both parties resorted to retrieving video of Lehnert's testimony in those earlier actions and selectively playing those portions they believed supported their respective contentions. The jury was essentially asked to determine whether Lehnert, an empty chair in New York, testified more credibly in Illinois or Texas. In this scenario, CPLR 3117 (a) (2) did not permit plaintiff to introduce the 2001 and 2003 depositions on his case-in-chief, and CPLR 3117 (c) did not permit defendant to impeach those depositions with another deposition." ***Billok v. Union Carbide Corp.*, 2019 N.Y. Slip Op. 02185, Third Dept 3-21-19**

COURT OF CLAIMS, PERSONAL INJURY.

QUESTIONS OF FACT WHETHER STATE HAD CONSTRUCTIVE NOTICE OF THE CONDITION OF THE ROAD WHICH ALLEGEDLY CAUSED PLAINTIFF'S BICYCLE ACCIDENT.

The Third Department determined claimant's motion for summary judgment in this bicycling accident case was properly denied. There were questions of fact whether the state had constructive notice of the road conditions which allegedly caused the accident: "There was no evidence that defendant had actual notice of this hazard and only conflicting evidence regarding constructive notice. Savoury testified that there had been no prior complaints or accidents and that the road was regularly inspected. However, defendant may be charged with constructive notice of the hazard if it 'existed for a sufficient period of time to allow defendant[] to discover and rectify the problem' ... . Although most of the witnesses attributed the bumps to the effects of cars driving over cold patch and the delamination to the effects of the freeze/thaw cycle, evidence regarding the length of time that the bumps and delaminated section were present was equivocal, and there was no evidence regarding how long the debris had been on the shoulder ... . Even if defendant had actual or constructive notice of the hazardous condition, claimant's submissions evince that temporary repair work had been done in the months leading up to the accident, and the submissions fail to demonstrate what 'reasonable [corrective] measures' should have been taken given the circumstances ... . Given the myriad factual questions presented, including whether defendant had notice of the hazardous condition in the highway but failed to respond with appropriate maintenance measures, the Court of Claims properly denied claimant's motion." ***Schleede v. State of New York*, 2019 N.Y. Slip Op. 02188, Third Dept 3-21-19**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), EVIDENCE.

DEFENDANT SHOULD NOT HAVE BEEN ASSESSED 20 POINTS FOR A CONTINUING COURSE OF SEXUAL MISCONDUCT, PROOF OF A SECOND INSTANCE OF SEXUAL MISCONDUCT WAS INSUFFICIENT, AN ALLEGATION IN AN INDICTMENT IS NOT, BY ITSELF, EVIDENCE THE INCIDENT OCCURRED.

The Third Department, reversing Supreme Court, determined that defendant should not have been assessed 20 points for a continuing course of sexual misconduct, noting that a reference in an indictment is not sufficient proof: "Defendant pleaded guilty to one count of having sexual intercourse with the victim and claimed that he only had sex with the victim once. The People presented a sworn statement given to the police by the victim's mother in which she recounts that, when she confronted the victim concerning her relationship with defendant, the victim told her that they 'had sex two times.' Even assuming that this statement constitutes reliable hearsay ... there is no indication by the victim as to when the acts of sexual contact occurred. Although the case summary states that the presentence investigation report reflects that acts of sexual contact occurred in May 2013 and September 2013, the only reference to a September 2013 act in that report is when it lists the charges contained in the indictment. Notably, 'the fact that an offender was arrested or indicted for an offense is not, by itself, evidence that the offense occurred' (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 5 [2006]). Inasmuch as there is no evidence in the record regarding when the second act of sexual contact occurred, we cannot say that there is clear and convincing evidence that two sexual acts occurred that were separated by at least 24 hours ...". ***People v. Hinson*, 2019 N.Y. Slip Op. 02184, Third Dept 3-21-18**

FAMILY LAW.

FAMILY COURT PROPERLY LIMITED THE CHILDREN'S VISITS WITH FATHER, WHO IS INCARCERATED, TO TWICE A YEAR.

The Third Department, over a partial dissent, determined Family Court properly limited visitation with father, who is incarcerated, to two visits per year. The dissent agreed visitation should be limited, but argued for four visits per year: "As the father argues, we recognize that recent social science research strongly supports the legal presumption that children benefit from continuing contact with an incarcerated parent ... . Nonetheless, the best interests of a child, and particularly a young child, may not be served by imposing in-person visits to a correctional facility. The atmosphere and setting of such

visits may be traumatic to the child and his or her view of the parent. Other means of contact, such as frequent phone calls and letters, can provide children and incarcerated parents meaningful communication and ways to continue and strengthen their relationships, without subjecting young children to unnecessary distress ... . Here, the children were six and seven years old at the time of the fact-finding hearing, the mother described a history of domestic violence, indicating that it had occurred in front of at least one of the children, and she remained concerned for both her safety and the mental well-being of the children, as she testified that the children were exhibiting behavioral difficulties following contact with the father. The father, meanwhile, is serving a lengthy sentence and is not eligible for release until, at the earliest, 2021. Accordingly, under the circumstances, we find that there is a sound and substantial basis in the record to support Family Court's determination limiting the father to biannual visitation, with weekly telephone contact with the children ...". ***Matter of Benjamin OO. v. Latasha OO.*, 2019 N.Y. Slip Op. 02187, Third Dept 3-21-19**

FREEDOM OF INFORMATION LAW (FOIL), ATTORNEYS, PRIVILEGE.

DOCUMENTS SOUGHT BY PETITIONER WERE EXEMPT FROM DISCLOSURE BASED UPON THE ATTORNEY-CLIENT PRIVILEGE, THE ATTORNEY WORK PRODUCT AND THE INTER-, INTRA-AGENCY COMMUNICATION EXEMPTIONS.

The Third Department, modifying Supreme Court, determined emails between the governor's office, counsel and Department of Transportation (DOT) employees concerning a gas station sublease which had been held by petitioner, but which was terminated by DOT, were exempt from disclosure based upon attorney-client privilege, attorney work-product, and the inter-, intra-agency communication exemption: "In determining whether a communication is protected by the attorney-client privilege, 'the critical inquiry is whether, viewing the lawyer's communication in its full content and context, it was made in order to render legal advice or services to the client' ... . In that regard, inasmuch as facts are the foundation of legal advice, the attorney-client privilege protects communications between an attorney and his or her client that convey facts relevant to a legal issue under consideration, even if the information contained in the communication is not privileged ... . Each of the emails at issue are communications between counsel in the Governor's Office and DOT employees that contain or reference factual information relevant to counsel providing legal advice regarding the proposed termination of the sublease. Accordingly, we conclude that the emails are protected by the attorney-client privilege and, therefore, Supreme Court erred in ordering their disclosure. Respondents further contend that preliminary drafts of the letter that was ultimately sent terminating the sublease are exempt from disclosure under FOIL as inter-agency or intra-agency materials and as attorney work product ... . The letters are drafts of the final termination notice that incorporate counsel's recommendations and that were circulated in furtherance of the decision-making process prior to a final determination; accordingly, they are exempt from disclosure under FOIL as inter-agency or intra-agency materials and as attorney work product ...". ***Matter of Gilbert v. Office of the Governor of the State of N.Y.*, 2019 N.Y. Slip Op. 02189, Third Dept 3-21-19**

FOURTH DEPARTMENT

CORPORATION LAW, DEBTOR-CREDITOR.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED, A DE FACTO MERGER OF THE JUDGMENT DEBTOR WITH THE CURRENT DEFENDANT WAS DEMONSTRATED.

The Fourth Department, reversing Supreme Court, determined plaintiff judgment-creditor's motion for summary judgment should have been granted. Plaintiff alleged a de facto merger between defendant Luigi's Bakery Corp and its predecessor Luigi's Family Bakery, making the Bakery Corp. liable for the Family Bakery's debt: "Factors courts consider in determining whether a de facto merger has occurred include 'continuity of ownership; . . . a cessation of ordinary business and dissolution of the predecessor as soon as practically and legally possible; . . . assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the predecessor; and . . . a continuity of management, personnel, physical location, assets, and general business operation' ... . Not all of these factors are required to demonstrate a merger; ' rather, these factors are only indicators that tend to show a de facto merger' ... . Here, defendants admitted to continuity of ownership between Family Bakery and Bakery Corp., and to two of the other factors of a de facto merger: cessation of ordinary business operations, and continuity of management, personnel, physical location, and general business operation. In both their answer and their bill of particulars, defendants admitted that the successor corporation, Bakery Corp., was formed in the same month that the predecessor corporation, Family Bakery, ceased operations. They also admitted that the successor corporation used the same address and phone number as the predecessor corporation. We therefore conclude that the court erred in determining that there are issues of fact with respect to the date of incorporation of the successor corporation or the date of dissolution of the predecessor corporation. A case for de facto merger can be made without a legal dissolution where, as here, the predecessor company 'has become, in essence, a shell' ...". ***Energy Coop. of Am., Inc. v. Luigi's Family Bakery, Inc.*, 2019 N.Y. Slip Op. 02211, Fourth Dept 3-22-19**

CRIMINAL LAW.

TRAFFIC STOP WAS SUPPORTED BY REASONABLE SUSPICION DESPITE THE DMV COMPUTER IMPOUNDMENT RECORD'S CAUTIONARY STATEMENT THAT THE VEHICLE SHOULD NOT BE CONSIDERED STOLEN.

The Fourth Department, over a two-justice dissent, determined the traffic stop was supported by reasonable suspicion even though the DMV impoundment record indicated the vehicle was not stolen: "Here, a New York State Trooper properly stopped the vehicle defendant was driving based on his check of Department of Motor Vehicles (DMV) computer records for the vehicle's license plate number, which revealed that the car had been impounded and thus should have been located in an impound lot ... . Our dissenting colleagues conclude that the Trooper did not have reasonable suspicion to stop defendant's vehicle because the Trooper disregarded cautionary language in the DMV impoundment record stating that it 'should not be treated as a stolen vehicle hit[, and] [n]o further action should be taken based solely upon this impounded response.' We conclude, however, that the Trooper's testimony that the cautionary language was 'generic,' inasmuch as it even 'comes up with stolen vehicles,' and that, based on his experience, he interpreted the impoundment record as requiring him to conduct a further investigation because the vehicle 'should not be out on the road,' establishes that the stop was not unreasonable. Rather, we conclude that the impoundment record, coupled with the Trooper's explanation of its import, provided reasonable suspicion to stop the vehicle. In disregarding the Trooper's explanation that the cautionary language was 'generic,' the dissent would obligate us to find unreasonable any stops where that same message appears, irrespective of the facts surrounding the stop. We reject such a categorical determination." ***People v. Hinshaw*, 2019 N.Y. Slip Op. 02252, Fourth Dept 3-22-19**

CRIMINAL LAW, APPEALS.

SURCHARGE, DNA DATABANK FEE, CRIME VICTIM ASSISTANCE FEE SHOULD NOT HAVE BEEN ASSESSED AGAINST A JUVENILE OFFENDER.

The Fourth Department, over a two-justice concurrence, determined that defendant juvenile offender waived his right to appeal but found that the surcharge, DNA databank fee and crime victim assistance fee should not have been imposed on a juvenile offender. The concurrence argued that the waiver of appeal precluded the challenge to the imposed fees, but the People waived defendant's appeal-waiver on that narrow issue: "As defendant contends and the People correctly concede, we conclude that the surcharge, DNA databank fee, and crime victim assistance fee imposed by County Court must be vacated because defendant is a juvenile offender ...". ***People v. Works*, 2019 N.Y. Slip Op. 02247, Fourth Dept 3-22-19**

CRIMINAL LAW, APPEALS.

PERIOD OF POSTRELEASE SUPERVISION CAN NOT BE IMPOSED ON AN INDETERMINATE SENTENCE, ILLEGAL SENTENCE CONSIDERED ON APPEAL EVEN THOUGH THE ISSUE WAS NOT RAISED BY EITHER PARTY.

The Fourth Department determined the period of postrelease supervision was not authorized for the indeterminate sentence imposed on the tampering with physical evidence conviction: "Supreme Court imposed a period of postrelease supervision in connection with defendant's conviction of tampering with physical evidence. That was error inasmuch as a period of postrelease supervision is not authorized in connection with an indeterminate sentence (see Penal Law § 70.45 [1] ...). Although the issue is not raised by either party, we cannot allow an illegal sentence to stand ... . We therefore modify the judgment by vacating that period of postrelease supervision ...". ***People v. Harvey*, 2019 N.Y. Slip Op. 02250, Fourth Dept 3-22-19**

CRIMINAL LAW, APPEALS.

DEFENDANT WAS 17 WHEN HE COMMITTED THE CRIMES AND WAS CONVICTED OF MURDER IN 1992, THAT CONVICTION WAS OVERTURNED AND DEFENDANT PLED GUILTY TO MANSLAUGHTER IN 2016, ALTHOUGH DEFENDANT WAIVED HIS RIGHT TO APPEAL, HE WAS ENTITLED TO CONSIDERATION OF WHETHER HE SHOULD BE AFFORDED YOUTHFUL OFFENDER STATUS.

The Fourth Department remitted the matter for consideration whether defendant should be afforded youthful offender status. The original murder conviction was in 1992. Defendant was granted a new trial and pled guilty to manslaughter in 2016. The youthful offender issue survives a waiver of appeal: "Defendant was 17 years old at the time he committed the underlying crimes and, based on the record before us, he appears to be an eligible youth within the meaning of CPL 720.10 (2). Defendant was sentenced, however, without the benefit of an updated presentence report. The court obtained from defendant a waiver of an updated report, which is generally permissible where, as here, the 'defendant had been continually incarcerated between the time of the initial sentencing and resentencing and at the time of . . . resentencing [the defendant] was afforded the opportunity to supply information about his [or her] subsequent conduct' ... . Nonetheless, '[w]hen determining whether a defendant is an eligible youth, the defendant's status at the time of the conviction—in this case at the time of his plea of guilty—is controlling' ... . The original presentence report prepared in 1992 on which the court relied is

insufficient to establish that defendant was an eligible youth at the time he pled guilty to the manslaughter counts in 2016. We therefore hold the case, reserve decision, and remit the matter to Supreme Court to make and state for the record a determination whether defendant is an eligible youth within the meaning of CPL 720.10 (2) with the benefit of an updated presentence report and, if so, whether defendant should be afforded youthful offender status." ***People v. Jarvis*, 2019 N.Y. Slip Op. 02206, Fourth Dept 3-22-19**

CRIMINAL LAW, ATTORNEYS.

HEARING NECESSARY ON THAT ASPECT OF DEFENDANT'S MOTION TO VACATE THE JUDGMENT OF CONVICTION WHICH ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL, DEFENDANT ALLEGED DEFENSE COUNSEL TOLD THE JURY DEFENDANT WOULD TESTIFY WITHOUT FIRST CONSULTING WITH DEFENDANT.

The Fourth Department, reversing County Court, determined defendant was entitled to a hearing on that aspect of his motion to vacate the judgment of conviction on ineffective assistance of counsel grounds. Defendant alleged defense counsel told the jury that defendant would testify without first consulting with defendant: "We ... conclude ... that defendant is entitled to a hearing with respect to whether counsel was ineffective in telling the jury that defendant would testify at trial. In support of his motion, defendant submitted his own affidavit stating that his trial counsel never discussed with him whether testifying would be a good or bad idea, and that he never told counsel that he would testify at trial, and that trial counsel nevertheless told the jury that defendant would testify. Defendant's account is supported by the affirmation of defendant's appellate counsel, who stated that trial counsel admitted that defendant did not tell him before trial that he would testify. Thus, defendant's allegations are potentially supported by other evidence, and 'it cannot be said that there is no reasonable possibility that [they are] true' ... . We therefore conclude that a hearing is required to afford defendant an opportunity to prove that trial counsel did not discuss with him whether he would testify before informing the jury that defendant would do so, and that there was no strategic or tactical explanation for telling the jury that defendant would testify ...". ***People v. Pendergraph*, 2019 N.Y. Slip Op. 02212, Fourth Dept 3-22-19**

CRIMINAL LAW, EVIDENCE.

THE PEOPLE DID NOT PRESENT EXTRINSIC EVIDENCE AT THE *DARDEN* HEARING THAT THE INFORMANT EXISTED, THEREFORE THE SUPPRESSION MOTION WAS GRANTED AND THE INDICTMENT DISMISSED.

The Fourth Department determined the evidence submitted by the People at the *Darden* hearing did not establish the existence of an informant with extrinsic evidence. Therefore the motion to suppress was granted and the indictment dismissed. The People presented only a death certificate purporting to demonstrate the informant was dead. No extrinsic evidence of the existence of the informant was presented: "The People must produce a confidential informant for an ex parte hearing upon defendant's request where, as here, they rely on the statements of the confidential informant to establish probable cause (... People v. Darden, 34 NY2d 177, 181 [1974] ...). ... There are, however, exceptions to the requirement that the People produce a confidential informant for a Darden hearing. If the People succeed in making a threshold showing that the informant 'is unavailable and cannot be produced through the exercise of due diligence' ... , they are permitted instead to establish the existence of the informant by extrinsic evidence ... . Even assuming, arguendo, that the People succeeded here in making such a threshold showing, we conclude that they nevertheless failed to establish the existence of the informant by extrinsic evidence ... . The evidence establishes only that a deposition was executed in the name of the alleged confidential informant, that the police obtained a search warrant using the deposition, and that a death certificate was later issued for a person having the same name as the confidential informant. There is no evidence that the alleged informant actually made the statements attributed to her ... . The People could have met their burden by offering the testimony of a police witness, which is evidence that is explicitly contemplated in Darden. Yet, they did not. Without it, there is nothing to refute the possibility that the police fabricated the statements in the informant's purported deposition in order to conceal the fact that information critical to the probable cause inquiry was instead obtained through illegal police action." ***People v. Givans*, 2019 N.Y. Slip Op. 02220, Fourth Dept 3-22-19**

CRIMINAL LAW, EVIDENCE.

POLICE ENTERED HOME ILLEGALLY AND OBTAINED CONSENT TO SEARCH BY MISLEADING THE OCCUPANT, MOTION TO SUPPRESS PROPERLY GRANTED.

The Fourth Department, affirming Supreme Court's suppression of a weapon found in a home, determined the police illegally entered the home and gained consent to search by misleading the woman in the home: "Asked by defense counsel why he entered the home, the officer testified, 'An individual who's known to carry guns entered that house running into that house actually, coming out acting nervous, there's a baby crying in the house, who is taking care of the baby?' ... [T]he People correctly concede that the officer entered the home illegally. An illegal entry by the police requires the suppression of the fruits of an ensuing search notwithstanding a voluntary consent, unless the consent attenuates the taint of the illegal en-

try ... . In determining whether the illegal entry is so attenuated, a court is required to consider a variety of factors, including: (1) the temporal proximity of the consent to the illegal entry; (2) whether there were intervening circumstances; (3) whether the purpose underlying the illegal entry was to obtain the consent or the fruits of the search; (4) whether the consent was volunteered or requested; (5) whether the person who gave consent was aware that he or she could refuse consent; and, most importantly, (6) the purpose and flagrancy of the misconduct ... . The purpose of the illegal entry was to recover a gun that the officer presumed was hidden inside. Any consent obtained thereafter was not volunteered. It was requested, and the woman was not advised that she could refuse consent. ... Most importantly, the officer engaged in flagrant misconduct. Without having witnessed any illegality, the officer entered a private residence without permission, after midnight, while a woman in that residence was trying to feed her newborn child,and coerced her into consenting to a search of her home." ***People v. Sweat*, 2019 N.Y. Slip Op. 02240, Fourth Dept 3-22-19**

CRIMINAL LAW, EVIDENCE.

SHOWUP IDENTIFICATION TESTIMONY SUPPRESSED, CONVICTIONS REVERSED.

The Fourth Department, reversing defendant's convictions, determined that the showup indentification testimony should have been suppressed. The showup took place 90 minutes after the occurrence of the crime, in a hospital parking lot, where defendant was handcuffed and flanked by officers. The victim had already identified the defendant in a hospital-room showup procedure: "We conclude that, '[g]iven the identification made by the victim' during the first showup, the noncomplainant witness's identification conducted far from the scene of the crime 'is not rendered tolerable in the interest of prompt identification' ... . The identification was also unjustified insofar as the noncomplainant witness was not present at the hospital as a victim ... . The People have proffered no reason that a lineup identification procedure would have been unduly burdensome under the circumstances ... . Absent any exigency or spatial proximity to the crime scene, and given that the showup occurred 'approximately 90 minutes after the occurrence of the crime, while defendant was handcuffed and' flanked by police, we conclude that, under the totality of the circumstances, the second 'showup identification procedure was infirm' ... . Inasmuch as the witness who identified defendant in the second showup procedure did not testify at the Wade hearing, 'the People did not establish that [he] had an independent basis for [his] in-court identification of defendant' ... , and 'there is no evidence upon which this Court can base such a determination' ... . We therefore conclude that defendant is entitled to a new Wade hearing on that issue ...". ***People v. Knox*, 2019 N.Y. Slip Op. 02230, Fourth Dept 3-22-19**

FAMILY LAW, JUDGES.

FAMILY COURT DID NOT MAKE THE REQUIRED FINDINGS OF FACT IN THIS FAMILY OFFENSE, CUSTODY AND VISITATION CASE, MATTER REMITTED.

The Fourth Department, sending the matter back to Family Court, determined Family Court did not make the requisite findings of fact in this family offense, custody and visitation case: "[W]e agree with the father that Family Court failed to adequately set forth its essential findings of fact (see CPLR 4213 [b]; Family Ct Act § 165 [a] ...). ...[T]he court failed to specify the family offense upon which the order of protection was predicated ... . [T]he court failed to 'set forth its analysis of those factors that traditionally affect the best interests of a child, namely, the relative fitness of each party, each parent's ability to provide for the emotional and intellectual development of the child, the ability to provide financially for the child, the quality of the home environment, the length of time and stability of prior custodial arrangements, [and] the need of a child to reside with siblings[, if any] . . . As a result, we are unable to review [the court's] ultimate factual finding regarding each of those factors and the weight it placed upon each factor relative to the best interests of the child[ ]' ... . Under the circumstances of these cases, we decline to exercise our discretion to make the requisite findings ...". ***Matter of Benson v. Smith*, 2019 N.Y. Slip Op. 02221, Fourth Dept 3-22-19**

FAMILY LAW, JUDGES.

JUDGE SHOULD NOT HAVE, SUA SPONTE, DRAWN AN ADVERSE INFERENCE AGAINST FATHER BASED UPON FATHER'S FAILURE TO CALL HIS GIRLFRIEND AS A WITNESS WITHOUT FIRST INFORMING FATHER AND GIVING FATHER A CHANCE TO EXPLAIN, ERROR DEEMED HARMLESS HOWEVER.

The Fourth Department determined the judge should not have drawn an adverse inference against father for his failure to call his girlfriend as a witness without first informing father and giving father a chance to explain. The error was deemed harmless however: " 'A party is entitled to a missing witness charge when the party establishes that an uncalled witness possessing information on a material issue would be expected to provide noncumulative testimony in favor of the opposing party and is under the control of and available to that party' ... . 'The party seeking a missing witness inference has the initial burden of setting forth the basis for the request as soon as practicable . . . to[, inter alia,] avoid substantial possibilities of surprise' ... . Here, in its written decision, '[t]he court sua sponte drew a negative inference based on the [father's] failure to call [his girlfriend] as a witness, and failed to advise [him] that it intended to do so' ... . Thus, the father 'lacked the opportunity

to explain [his] failure to call [his girlfriend] as a witness, or to discuss whether [his girlfriend] was even available to testify or under [his] control' ... . We conclude, however, that the error did not affect the result ...". ***Matter of Liam M.J. (Cyril M.J.),* 2019 N.Y. Slip Op. 02207, Fourth Dept 3-22-19**

PERSONAL INJURY.

DEFENDANTS DID NOT DEMONSTRATE THRESHOLD STRIP WHICH ALLEGEDLY CAUSED PLAINTIFF TO SLIP AND FALL WAS NOT INHERENTLY DANGEROUS AND TRIVIAL AS A MATTER OF LAW, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined defendants did not demonstrate the threshold strip which allegedly caused plaintiff to slip and fall was not inherently dangerous and was trivial: " '[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case' ... , and the existence or nonexistence of a defect or dangerous condition 'is generally a question of fact for the jury' ... . Defendants' submissions in support of their motion included excerpts of plaintiffs' deposition testimony and defendants' affidavits, which raised a question of fact whether the threshold strip on the step created an unreasonably dangerous or defective condition. We further conclude that summary judgment dismissing the complaint was not warranted on the ground that the alleged defect was, as a matter of law, too trivial to be actionable. It is well settled that 'a small difference in height or other physically insignificant defect is actionable if its intrinsic characteristics or the surrounding circumstances magnify the dangers it poses, so that it unreasonably imperil[s] the safety of' a pedestrian' . Here, it is impossible to ascertain from the black and white photographs submitted by defendants in support of the motion the width, depth, elevation, height differential or actual appearance of the threshold, and thus defendants failed to establish that the defect was, in fact, trivial. In addition, the threshold and step were located in a doorway, 'where a person's attention would be drawn to the door, not to the [step]' ...". ***Wiedenbeck v. Lawrence*, 2019 N.Y. Slip Op. 02246, Fourth Dept 3-22-19**

PERSONAL INJURY.

PLAINTIFF MADE A LEFT TURN IN FRONT OF DEFENDANT'S ONCOMING CAR WHEN DEFENDANT WAS FOUR CAR LENGTHS AWAY, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED, PLAINTIFF'S ALLEGATION THE TRAFFIC LIGHT WAS YELLOW DID NOT RAISE A QUESTION OF FACT.

The Fourth Department, reversing Supreme Court, determined defendant's motion for summary judgment in this intersection traffic accident case should have been granted. Plaintiff made a left turn in front of defendant. Plaintiff's claim that defendant was proceeding through a yellow light did not raise a question of fact: "[W]e conclude that the record establishes that plaintiff made a left turn in front of defendant's oncoming vehicle, which was only four car lengths away from the intersection and traveling at the speed limit of 40 miles per hour. At that speed and distance, defendant entered the intersection with insufficient time to take evasive action to avoid the collision ... . Thus, defendant's vehicle was so close to the intersection as to constitute an immediate hazard to the left-turning plaintiff, and plaintiff was therefore required to yield the right-of-way to defendant (see Vehicle and Traffic Law § 1141). In addition, plaintiff's assertion that the traffic light facing her vehicle had changed from green to yellow just before she started to make her left turn does not raise a question of fact inasmuch as a yellow light would not deprive defendant of the right-of-way and confer it upon plaintiff ...". ***Godwin v. Mancuso*, 2019 N.Y. Slip Op. 02248, Fourth Dept 3-22-19**

PERSONAL INJURY, MUNICIPAL LAW.

UNEXCUSED FAILURE TO APPEAR AT A SCHEDULED GML § 50-h HEARING REQUIRED DISMISSAL OF THE COMPLAINT.

The Fourth Department, reversing Supreme Court, determined plaintiffs' failure to comply with defendants' demand for a GML § 50-h hearing required dismissal of the complaint. Defendants were sued in their capacities as municipal employees acting within the scope of their employment: "We agree with defendants that Supreme Court erred in denying the motion. 'It is well settled that a plaintiff who has not complied with General Municipal Law § 50-h (1) is precluded from maintaining an action against a municipality' ... . Here, plaintiffs failed to appear at the scheduled examination due to an apparent disagreement with their attorney. Under the circumstances, plaintiffs had the burden of rescheduling the examination and, because they failed to do so, they were barred by statute from commencing an action ... . 'Although compliance with General Municipal Law § 50-h (1) may be excused in exceptional circumstances' ... , there were no such circumstances here." ***Kluczynski v. Zwack*, 2019 N.Y. Slip Op. 02236, Fourth Dept 3-22-19**

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